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In The
Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Clifton S. Elgarten
Counsel of Record
Richard McMillan, Jr.
Daniel W. Wolff
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2500

Counsel for Petitioners

QUESTION PRESENTED

For purposes of a federal court's application of *forum non conveniens*, where the alternative to pursing the case in the U.S. is pursuing the case in another country, is the relevant *domestic* forum the United States (as the First, Eighth, and Eleventh Circuits have held) or merely the specific judicial district in which the district court sits (as the Third Circuit held below)?

RULE 29.6 STATEMENT

KPNQwest N.V. is a former Dutch telecommunications company in liquidation in the Netherlands. Petitioners Marcel Windt and E.T. Meijer ("Trustees") are trustees for the bankruptcy estate. Shares in KPNQwest N.V. were publicly held. The bankruptcy estate of KPNQwest N.V. has a number of creditors, some of which are publicly traded companies. If the Court requests, the Trustees can provide a list of creditors.

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PETITION FOR A WRIT OF CERTIORARI

Marcel Windt and E.T. Meijer ("Trustees"), trustees for the bankruptcy estate of KPNQwest N.V. ("KPNQwest"), respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit affirming dismissal of this case on grounds of *forum non conveniens*.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 529 F.3d 183 (3d Cir. 2008) and reprinted here beginning at Appendix ("App.") 1a. The district court's decision is reported at 544 F. Supp. 2d 409 (D.N.J. 2008) and reprinted here beginning at App. 38a.

JURISDICTION

The court of appeals denied the Trustees' petition for rehearing and rehearing *en banc* on July 14, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS

The following treaty and statutory provisions are relevant to the Court's consideration of the question presented:

The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, art. V, March 27, 1956, 8 U.S.T. 2043, provides that Dutch companies and nationals shall be "accorded national treatment with respect to access to the courts of justice [of the United States] in all degrees of jurisdiction, both in

pursuit and in defense of their rights." The text is reprinted in Appendix G.

The U.S. venue-transfer provision, 28 U.S.C. § 1404(a), states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The text is reprinted in Appendix F.

11 U.S.C. § 1501, *et seq.* incorporates the Model Law on Cross-Border Insolvency into U.S. law; 11 U.S.C. § 1504 provides foreign bankruptcy representatives direct access to U.S. bankruptcy courts; 11 U.S.C. § 1509(f) preserves a foreign bankruptcy trustee's right to pursue remedies in U.S. courts of general jurisdiction. The text of these provisions of Chapter 15 of the Bankruptcy Code are reprinted in Appendix H.

STATEMENT

This case presents a foundational question about the way a federal court in the United States should address *forum non conveniens* issues in an international setting. The court below answered that foundational question in a way that conflicts with the decisions of at least three other circuits. In so doing, it has constructed a major impediment to foreign plaintiffs bringing suit in the United States under federal law even when the claim is being asserted against U.S. companies and citizens in their home forum and even where the foreign plaintiffs are, by treaty, entitled to treatment on a par with U.S. citizens.

The question is especially appropriate for this Court to resolve because it addresses how federal courts present themselves and the United States to the world in the context of international litigation: either as part of a unified system of U.S. courts, as Congress intended, or as individual courts linked primarily to the particular districts in which they sit. In an era of expanded international trade, and at a time of unprecedented global economic turbulence and cross-border commercial disputes, it is critical to establish uniform federal law on this recurring and important issue. The Third Circuit's decision is at odds with this Court's precedents, the law of (at least) three other circuits, the statutory scheme established by Congress, and is, at a minimum, in tension with U.S. treaty obligations and policies affording foreign bankruptcy representatives access to U.S. courts in connection with international insolvencies.

Factual Background.

Plaintiff Trustees, the duly-appointed representatives of KPNQwest's bankruptcy estate in liquidation in the Netherlands, brought this claim in the United States against a U.S. corporation and several U.S. citizens and residents, seeking recoveries for the estate. They did so after obtaining approval of the Dutch court supervising the bankruptcy to commence this action.

As set forth in the First Amended Complaint, KPNQwest was a joint venture between Denver-based Qwest Communications International, Inc. ("Qwest"), a major U.S. telecommunications

company, and Koninklijke KPN N.V. a/k/a Royal KPN N.V., a Dutch telephone company.

The Trustees have alleged that KPNQwest was dominated by Qwest and Qwest officers who were placed in key positions. Qwest's Executive Vice President of International Business, Jack McMaster, a New Jersey resident, was installed as KPNQwest's CEO even as he continued to be paid by Qwest, and continued to report directly to Qwest's CEO, Joseph Nacchio. McMaster was also the sole member of KPNQwest's Management Board. Nacchio, also a New Jersey resident, took a seat on KPNQwest's Supervisory Board, actively participated in Supervisory Board meetings, and communicated with McMaster (who had temporarily relocated to Europe) on a daily basis from the United States. Robert Woodruff, Qwest's Chief Financial Officer and a resident of Colorado, also took a seat on the Supervisory Board, but continued to conduct his affairs as Qwest's CFO from the United States. Other Qwest executives were installed in key positions of control or influence at KPNQwest, such as the "Management Team" that assisted McMaster. Additional members of the Supervisory Board are U.S. residents.

KPNQwest was a valued asset on Qwest's U.S. books. It was therefore important to Qwest and its executives in the United States to maintain the appearance of value. To that end, Qwest and its personnel, operating from the United States, exercised control over KPNQwest and the way that

KPNQwest accounted for revenue. addition, Qwest arranged transactions with, and for, KPNQwest.

At the heart of the Trustees' case is the exporting of a deceptive accounting technique, by Qwest to KPNQwest, that caused key "non-Qwest" decision-makers and Supervisory Board members at KPNQwest to believe that business was thriving even though it was not. Far from it, KPNQwest was sinking deep into insolvency. Defendants' manipulations were ultimately exposed, resulting in KPNQwest's rapid demise.

KPNQwest declared bankruptcy in May 2002. It faces a liquidation deficit of more than $2 billion dollars. McMaster and various other executives, including KPNQwest's Chief Financial Officer, Chief Marketing Officer, and Vice President of Finance, returned to or took up residence in the United States. *See* App. 99a-104a.

Procedural History.

The Trustees filed this action on June 29, 2004, asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (describing deceptions perpetrated on the KPNQwest Board and decision-makers) and for mismanagement under Dutch law. Eighteen months into the case,

Defendants moved to dismiss on a theory of *forum non conveniens*.[1]

The Trustees opposed. They pointed out the reasons why they had brought this suit in the United States, namely that: (a) all defendants resided in the United States; (b) many of the most significant witnesses resided in the United States; (c) all of the documents that the Trustees sought from Qwest and others were in the United States (though the Trustees' own documents were in the Netherlands); (d) many of the alleged fraudulent acts were conducted from, and all were instigated in, the United States; (e) the principal beneficiary of the alleged scheme – Qwest – was located in the United States; (f) other factually related civil suits were pending here, seemingly making it more convenient for *defendants* to coordinate their litigation efforts here; (g) U.S. law should apply to unlawful acts committed from within U.S. borders; and (h) if they had filed suit in the Netherlands, it was far from certain that the Trustees could have compelled the attendance of all defendants and many of the witnesses.

Notwithstanding these considerations, the district court granted the defendants' motion and dismissed the case on grounds of *forum non conveniens*. *See* App. 38a, *et seq*.

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[1] Defendants had first moved to compel arbitration. That motion was denied by the magistrate judge and affirmed by the district court judge on appeal.

District Court Decision.

The district court's dismissal rested substantially on its view that U.S. courts are suspicious of foreign plaintiffs – including bankruptcy trustees operating under the statutory authority and supervision of their home nations – when they bring suit in the United States, even against U.S. defendants.

The district court indeed introduced its discussion of *forum non conveniens* by positing that U.S. courts "are suspicious" of foreign plaintiffs. App. 50a. It viewed foreign plaintiffs as likely "motivated by a search for a jurisdiction with laws that would be the most favorable for the claim." *Id.* *See also id.* n.10 (positing reasons why foreign plaintiffs would want to sue in the United States).

While acknowledging that plaintiffs generally have the right to choose the forum, the district court noted that deference to plaintiff's forum choice is granted presumptively only if the plaintiff proceeds in its home forum. Otherwise, deference is granted only if the plaintiff shows some measure of convenience (*i.e.*, a reason) for proceeding outside its home forum. *See* App. 49a, 57a-58a.

Here, the district court assigned only a "low degree of deference" to the Trustees' choice of forum because, on an individual and personal level, they had "neither personal nor business contacts with the United States or the State of New Jersey" and no intention of "moving their personal or business interests into the United States (or to the state of

New Jersey in particular)...." App. 57a, 58a. In focusing on the Trustees' *personal* convenience, the district court declined to evaluate the litigation-related reasons (convenience to documents, defendants and witnesses) why the Trustees viewed the United States as a convenient place to litigate in their appointed capacity.

The district court also suggested that as Dutch citizens, the Trustees were not entitled to deference in their choice of forum absent a treaty granting them treatment on a par with U.S. citizens. *See* App. 54a n.13. Positing the importance of such a treaty, the district court mistakenly held that there was no treaty granting Dutch citizens parity of treatment with U.S. citizens in U.S. courts. *See* App. 57a n.14. This was incorrect: The district court failed to realize that there is such a treaty, and that it was in the record of this case (*see* App. 106a). The treaty of friendship between the Netherlands and the United States provides that Dutch companies and nationals shall be "accorded national treatment with respect to access to the courts of justice [of the United States] ... in all degrees of jurisdiction, both in pursuit and in defense of their rights."[2]

The district court then opined that "the community of the District of New Jersey" had "little interest in the resolution of this case." App. 68a.

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[2] Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, art. V, March 27, 1956, 8 U.S.T. 2043. *See* App. 106a.

The court found that the competing private interests – access to evidence, cost of witness attendance, availability of process, and availability of impleader – were essentially a wash, yet concluded (erroneously, and notwithstanding that the burden of proof should have been on the defendants) that a wash favored dismissal. *See* App. 72a-81a.

The district court also stated that defendants were not obligated to demonstrate that the chosen forum was "oppressive or vexatious" to defendants – the traditional burden on defendants seeking dismissal for *forum non conveniens* under the cases of this Court. The district court stated that defendants did not have to shoulder that burden if plaintiff is foreign. *See* App. 81a.

Finally, the court rejected as irrelevant the significance of Chapter 15 of the Bankruptcy Code (11 U.S.C. § 1501, *et seq.*). *See* App. 91a-97a. Chapter 15 reflects a national policy encouraging U.S. courts to assist foreign bankruptcy trustees in pursuing their duties in federal court. It establishes special access to U.S. bankruptcy courts and preserves all other remedies historically available to bankruptcy trustees. *See* 11 U.S.C. § 1501 (stating purpose of facilitating cross-border insolvency proceedings in the interest of cooperation, fairness, efficiency, and trade and investment); *id.* § 1509(f) (preserving right of access to U.S. courts of general jurisdiction).

The Third Circuit's Decision.

On March 2, 2007, the Trustees appealed to the Third Circuit. Defendants cross-appealed on the arbitration issue they had earlier raised and lost (*see supra*, note 1). On appeal, the Trustees argued, *inter alia*, that the district court had been improperly hostile to their effort, as foreigners, to prosecute their claims in the United States. Over the course of its decision, the Third Circuit acknowledged several of the district court's errors.

Nonetheless, the Third Circuit affirmed on the basis of a theory, urged by defendants, that is equally inconsistent with the historical treatment of foreign plaintiffs in U.S. courts. Specifically, the Third Circuit ignored the Trustees' showing of convenience in the *United States*, holding that the inquiry should focus on the convenience of proceeding in *New Jersey*.

The Third Circuit panel stated that New Jersey "is not the home forum of the corporate defendant," that there was "no indication that evidence is concentrated in New Jersey," and that there was no "indication that a substantial amount of conduct giving rise to the instant dispute occurred in New Jersey." App. 15a. It held that because there was no clear connection to New Jersey, the Trustees would be denied the deference that a plaintiff is typically granted in choosing a forum. *See id.*

The panel stated that the relationship of a federal case to the United States "should be considered," but that "considerations of local

inconvenience may be so strong as to a [sic] dwarf considerations of national convenience." App. 16a.

The Third Circuit qualified its dismissal by stating that it was only ruling that the suit could not be maintained in New Jersey, and that it "would be problematic" to preclude the Trustees from reinstituting their suit in some other federal district. *See id.* It declined to address whether suit in the United States was appropriate in general. The Third Circuit's district-by-district approach thus expressly opens up the possibility of seriatim cases, in different districts, where each court would consider separately the relative convenience of its district as compared to the Netherlands.

Turning to public and private interest factors, the Third Circuit highlighted that the Trustees' claim was not "local" to *New Jersey*, and that "without a dispute local to the community of New Jersey, there is little public interest in subjecting that community to the burdens of jury service." App. 20a. The court found that "the Netherlands" did, by contrast, have a substantial interest in resolving this dispute. *See id.* It did not explain why it compared the public interests of the *country* of the Netherlands with those of the *State* of New Jersey.

Thus, on June 10, 2008, the court of appeals affirmed the district court's order of dismissal based

on *forum non coveniens*.[3] The Trustees timely petitioned for rehearing or rehearing *en banc*. That petition was denied on July 14, 2008. *See* App. 36a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION – ON WHICH THE CIRCUITS ARE DIVIDED – OF WHAT IS THE RELEVANT DOMESTIC FORUM.

The *forum non conveniens* analysis, as applied in an international setting, should require that the federal court compare the relative convenience or inconvenience of proceeding in the United States as a whole with the convenience of proceeding in some foreign country. The Third Circuit held to the contrary, endorsing a comparison between litigating in the foreign country (here, the Netherlands) and litigating in the particular federal district in which the case was brought (here, New Jersey).

The Third Circuit's approach is in direct conflict with the decisions of at least three other circuits that have held squarely to the contrary – and also decisions of several other circuits that have done so implicitly. *See Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1313 (11th Cir. 2002) (holding that entire United States is relevant forum); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 429 (1st Cir. 1991) (same); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir.

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[3] The court did not address the arbitration issue raised in the cross-appeal, finding it moot. *See* App. 32a.

1991) (same); *see also Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609 (D.C. Cir. 1983) (implying same by its application of the principle); *Villar v. Crowley Mar. Corp.*, 782 F.2d 1478, 1482-83 (9th Cir. 1986) (same). This Court's own cases reflect that the comparison must be with the United States as a whole, not a single judicial district. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240-41 (1981). *See also* discussion *infra* at 29-32.

Moreover, the conflict is an especially important one for this Court to resolve: The conflict arises in connection with the way the United States presents itself to the world and against the backdrop of laws and treaties that determine access to the federal courts as a matter of national, not local, policy. *See also* discussion *infra* at 32-34.

The Third Circuit's provincial focus on contacts with New Jersey, rather than the United States, ignores two fundamental precepts: (1) the federal court system represents a unified judiciary in which any district court should be capable of answering the question whether the case should proceed *anywhere* in the United States; and (2) in an international case, where the question is whether a case belongs in some foreign country, or in the United States, the entire nation, not the particular federal district in which the case was filed, provides the frame of reference for comparison. The federal government, and the federal courts, speak to the world not as separate districts but with a unified voice. The decision whether a case should be dismissed because

it is more properly brought in some foreign country is necessarily answered by considering the interests and contacts with this country, not some segment of this country.

The settled understanding that the United States provides the frame of reference for an international *forum non conveniens* inquiry is also firmly embedded in the statutory framework that Congress created to govern the distribution of cases within the federal judiciary. The Third Circuit's approach conflicts with that statutory framework by conflating the question whether a case should proceed in the United States with the separate question of the proper judicial district in which it should proceed. The question of whether a suit should proceed *in the United States* is entirely distinct from the question of whether it should proceed in a *particular judicial district*. The former question, of international implication, is determined under the doctrine of *forum non conveniens*. The latter question, of proper venue in the United States, is determined under 28 U.S.C. § 1404(a).

If it is determined under a *forum non conveniens* analysis that the suit is properly in the United States, the federal courts may then determine, under § 1404(a), *where* within the federal court system the suit should be heard. Or the process may be decided in reverse order: As specifically reflected in *Piper*, 454 U.S. at 240-41, the federal courts may first determine the best venue for the case to be heard in the United States, and then the chosen court may determine whether the case is really better suited to

be tried in another country. Either way, the *forum non conveniens* question (should the case proceed in the United States?) and the § 1404(a) question (should the case proceed in the particular judicial district?) are distinct. *See also* discussion *infra* at 25-28.

The weakness in the conceptual foundations of the Third Circuit's approach and the inconsistency of that approach both with the statutory framework for deciding such issues and with the law of five other circuits warrant this Court's attention. But the Third Circuit's approach is also of great practical importance given the large number of international commercial disputes engendered by an expanding global economy. The Third Circuit's approach dramatically shifts the balance in a *forum non conveniens* analysis and will result in more cases, even against U.S. defendants, being pursued in foreign courts.[4] Cross-border cases often involve U.S.-based defendants, witnesses, documents, and events spread across many judicial districts. Businesses operate in several states, their employees reside in different states, witnesses reside in different states, and documents may be stored in

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[4] It seems perfectly ordinary to sue a U.S. defendant in the United States. On its face, that approach appears designed to avoid long disputes over venue. If, instead, suing a U.S. defendant in a U.S. court will result in long, drawn-out battles over venue, such as the one here, and which may ultimately produce dismissals, foreign plaintiffs may simply choose to try to drag U.S. defendants to foreign courts.

different places. There may be no single judicial district in which suit is especially convenient, even if it is clear that the great weight of witnesses, documents, interests, and contacts are in the United States (as a whole). Thus, under the Third Circuit's approach, fewer foreign plaintiffs will be able to maintain their cases in the United States.

Indeed, the Third Circuit's focus on the district, rather than the United States, produces disturbing results in another way. Because the Third Circuit held that its duty was to determine only whether suit belonged in the District of New Jersey, and that it could not make a determination as respects the United States as a whole, the Third Circuit recognized that it remains for the Trustees to re-file elsewhere and test *forum non conveniens* issues anew in that other district. That seriatim approach to *forum non conveniens*, where federal courts in different judicial districts separately consider how suit in a given district stacks up against suit in the foreign country, is both unusual and troubling. It creates the unseemly possibility of having different federal courts address the same question from their own particular geographic and provincial perspectives, with the possibility of different outcomes depending on (a) the contacts between the case and the given judicial district; and worse, (b) the particular *forum non conveniens* legal test applied in that district. Having multiple district courts rule seriatim on such an issue in the same case, with the potential for conflicting approaches and conflicting results, should be unnecessary in our federal system. *See also* discussion *infra* at 28-29.

In sum, this petition presents important issues that this Court can readily resolve and should resolve. The Court should hold that for purposes of the *forum non conveniens* analysis, the relevant "U.S. forum" is the entire United States.

A. Proper *Forum Non Conveniens* Analysis Requires A Proper Definition Of The Forum.

The "central focus" of *forum non conveniens* is convenience. *See Piper*, 454 U.S. at 249 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). A plaintiff is ordinarily entitled to choose the forum for his suit. Plaintiff's choice of forum should "rarely be disturbed," *id.* at 241, and only may be disturbed if the defendant can show that trial in the chosen forum would "establish ... oppressiveness and vexation to [the] defendant ... out of all proportion to plaintiff's convenience...." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). *See also Williams v. Green Bay & W R. Co.*, 326 U.S. 549, 554 n.4 (1946) ("actual hardship" is the *sine qua non* of a successful *forum non conveniens* defense).

The "heavy burden" is always on defendant to show that the balance in the case is tipped so far against the particular forum that one may infer that it is being pursued in that forum as a weapon, *i.e.*, to vex or oppress. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007). In short, the *forum non conveniens* doctrine, as historically practiced, ensures that the plaintiff's choice of forum is not used "*solely in order to harass the defendant or take advantage of*

favorable law." *Piper*, 454 U.S. at 249 n.15 (emphasis added).

Forum non conveniens thus rests fundamentally on a comparison, balancing the conveniences of two competing forums. *See id.* at 241. In showing that the balance tips decidedly against the U.S. forum, it is essential, as a practical matter, to define what that U.S. forum is.

Defining the forum is also important in a second respect: helping to establish the deference afforded plaintiff's forum choice. Under this Court's precedents, the plaintiff's forum choice has been given great deference when plaintiff brings suit in its home forum. The home forum is presumptively convenient (and not vexatious). *See id.* at 255-56. However, a plaintiff suing outside its home forum, including a foreign plaintiff, was traditionally not given the same deference because it was presumptively less convenient for a plaintiff to bring suit outside its home forum, and thus more likely that the suit was brought to be vexatious.[5] *See id.*

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[5] There is reason to question whether this presumption still has a factual basis. Business plaintiffs frequently bring suit in *defendant's* home forum, often to *avoid* venue and jurisdictional disputes that might arise from dragging defendants elsewhere. Suit in defendant's home forum could properly be encouraged; no presumption should arise against it. Indeed, a healthier skepticism might be applied to a defendant's assertion that suit in its home forum is vexatiously inconvenient to it. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005) (foreign plaintiff's "decision to litigate in New

(continued....)

But the courts agree that a plaintiff regains the presumption of convenience, and thus deference to its choice of forum, where that plaintiff shows some measure of actual convenience in the chosen forum. *See, e.g., Lony v. E.I. du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989); *Lony v. E.I. du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991). Where a showing is made that some measure of convenience supports the plaintiff's choice of forum, deference to plaintiff's choice of forum is restored.

This is especially true where the foreign plaintiff files suit in *defendant's* home forum. That, too, provides a strong indicator of convenience and demonstrates an obvious effort to *avoid* disputes about proper venue. There is simply nothing wrong or suspicious in a plaintiff suing in *defendants'* home court. *See supra*, note 5.

Here, the Trustees made a straightforward demonstration that they had not come to the United States to harass, but rather (upon being granted permission by the Dutch bankruptcy court) because

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(continued) . . .

York, where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed its decision to sue outside its home forum"). Cases in which U.S. courts have been skeptical of a foreign plaintiff's choice of a U.S. forum typically involve a *foreign* plaintiff's effort to sue *foreign* defendants in U.S. courts. *E.g., Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697 (1950).

it was convenient. The Trustees were following traditional notions of venue and fair play by bringing suit in defendants' home forum. Specifically, the pleadings and other papers demonstrated that:

- All defendants resided in the United States (and two of the individual defendants resided in New Jersey, making New Jersey an appropriate place for suit);
- Numerous witnesses, identified by affidavit, resided in the United States (including New Jersey and Colorado, as well as several other states);[6]
- The documents the Trustees were seeking (as opposed to those that they already possessed) were in the United States;
- Many of the alleged fraudulent acts were conducted or instigated in the United States;
- The principal beneficiary of the scheme was located in the United States;
- Other related civil suits were pending in the United States and it would have been easier for *defendants* to coordinate their litigation efforts in the same country;
- It was by no means certain that had they filed suit in the Netherlands, the Trustees

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[6] *See* App. 99a-104a.

could have compelled the attendance of all defendants; and

- The United States has an interest in applying its law to unlawful acts committed from within its borders.

Thus, this was a *country* in which *all defendants* reside, many key witnesses reside, the documents that the Trustees sought are located, personal jurisdiction over all defendants was certain, and much of the wrongdoing occurred. Suing in *defendants'* home forum seemed to provide a logical way of avoiding disputes over the proper forum and jurisdiction. For these reasons, the United States was a convenient and logical forum for this case.

In response to the Trustees' demonstration of the convenience of trying this case in the United States, defendants urged the Third Circuit to focus on New Jersey, claiming there was not "any support for Appellants' repeated assertion that the *forum non conveniens* analysis focuses on the U.S. as a whole," and contending that "the proper analysis focuses on ties to the forum district." The Court of Appeals accepted that approach and crafted its opinion based only on its analysis of the connections of the Trustees' lawsuit to *New Jersey* – and the interests of New Jersey and its jury venire in this lawsuit – which it regarded as *de minimis*. *See* App. 20a.

B. The Third Circuit's Focus On The "New Jersey Forum" Is At Odds With Basic Principles Of *Forum Non Conveniens* As Applied In The Federal Courts.

1. The United States Comprises A Single "Forum" In International Cases.

The federal government has a single, unitary court system. *See* U.S. Const., art. I, § 1. As a matter of convenience, economy, and practical sense, that system is divided into judicial *districts*, 28 U.S.C. §§ 81-131, but it remains a "unified federal system." *Piper*, 454 U.S. at 254. Each federal district court is given the power to decide issues affecting the United States as a whole, not merely issues affecting the interests of its particular judicial district. The Third Circuit's decision to address only the conveniences of the particular judicial district is fundamentally out of step with that authority.

In the international setting, where the choice is between suit in a foreign country and suit the United States, a federal court presented with a *forum non conveniens* motion may thus determine – and is assigned to determine – whether suit is proper in the United States, not merely in the particular district or state in which the court sits.

Indeed, the idea that the district court, as part of a single federal judiciary, should decide whether the case belongs in the United States (not just the judicial district in which it sits) reflects the way in

which the United States Government, including its court system, presents itself to the rest of the world. In matters of foreign policy and dealings with foreign governments, it is the United States of America that presents the nation's face to the world. *See United States v. Pink*, 315 U.S. 203, 233 (1942) (noting that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (pointing out that "complete power over international affairs is in the national government," and that "in respect of our foreign affairs generally, state lines disappear"). Thus, on an international level, the federal government enters into treaties with foreign governments about jurisdiction (*e.g.*, the treaty of friendship with the Netherlands), and enacts laws about how the United States will receive and treat foreign appointees, such as bankruptcy trustees (*see* 15 U.S.C. § 1509), as a nation. In the rare circumstances when courts are called upon to address the world – as in the *forum non conveniens* analysis, where the court decides whether it will keep an international lawsuit – the federal court should speak for the United States as a whole, not for a single district.

Moreover, as a matter of common sense, when judges weigh the relative conveniences of proceeding in a foreign nation, such as the Netherlands, against a U.S. forum, the comparison must be at the level of comparable political units. If judges are to consider the relative conveniences of proceeding in a foreign country, which they do (rather than the conveniences of proceeding in a particular province

or canton or department or municipality), they should choose a comparable unit here. That unit is the United States, not a particular judicial district or state.

The Third Circuit's approach rests on a form of provincialism that is inconsistent with the position of the United States in international relations. As explained above, by dividing the contacts, convenience, and interests of the United States among judicial districts, the practical result is that it will be much more difficult to maintain suit in the United States when a foreign forum might alternatively be available. But it reflects an equally important matter of principle: The United States has interests that go beyond the interests of a local jury venire. The real question in applying the *forum non conveniens* doctrine is not whether it is proper to burden the citizens of a particular judicial district with jury service, which is a § 1404(a) venue issue, but whether it is reasonable to burden *U.S. citizens* with jury service in the case.[7] Thus, the Third Circuit's focus on the lack of interest of the New Jersey venire was misplaced.

The principle that in the federal *forum non conveniens* analysis the proper comparison is between the conveniences of the United States as a forum with the convenience of the foreign nation as a

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[7] *See, e.g., Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 430 (1st Cir. 1991) (discussing the imposition of jury duty on United States citizens in dispute "local to the United States").

forum has long been implicit in the decisions of this Court and other circuit courts. *Piper*, for example, was a wrongful death case stemming from an airplane crash in Scotland that, after several venue changes, ended up in the Middle District of Pennsylvania. 454 U.S. at 240-41. In upholding the district court's dismissal, the Supreme Court looked at "[t]he American interest in this accident" versus the interests of the Scottish forum. *Id.* at 260-61. *Accord Villar v. Crowley Mar. Corp.*, 782 F.2d 1478, 1482-83 (9th Cir. 1986) (referring to the "American forum" and weighing the interests of "American jurors and court personnel" in its *forum non conveniens* analysis); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 609-10 (D.C. Cir. 1983) (in suit brought by foreign plaintiffs, citing the litigation's "connection with the United States" and the "strong national interest in the litigation").

2. The Third Circuit's Approach Undermines The Statutory Framework Governing Choice Of Forum.

The Third Circuit's *forum non conveniens* formulation undermines the framework established by Congress for distributing cases among the various federal district courts. The common law doctrine of *forum non conveniens* had historically been used as a means of choosing between courts within the United States, as well as between the United States and foreign nations. But the former use for *forum non conveniens* has not been applied in the *federal court*

system since passage of 28 U.S.C. § 1404(a), the venue-transfer statute, over 60 years ago. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) ("federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad"); *Piper*, 454 U.S. at 253 (Congress intended § 1404(a) "to be a revision rather than a codification of the common law" doctrine of *forum non conveniens*); *Sinochem*, 127 S. Ct. at 1191.

Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Thus, if a case is filed in a district where venue is proper but otherwise inconvenient, the remedy is not to dismiss – as the Third Circuit did here because of its focus on the convenience of the New Jersey District – but to transfer it to another, more convenient, district. *See* 28 U.S.C. § 1404(a). Even where venue is improper, *transfer* within the federal system is preferred "if it be in the interest of justice." *Id.* § 1406(a).[8] *See also id.* § 1631.

The rule thus reflected in the present statutory scheme is straightforward: The question whether the particular district is convenient *vis-a-vis* some other district is decided under § 1404(a), with transfer being the appropriate remedy. The *forum*

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[8] *E.g.*, *Lafferty v. St. Riel*, 495 F.3d 72, 82-83 (3d Cir. 2007).

non conveniens doctrine, as applied in the international context, answers the question whether the suit belongs in this country.

Indeed, questions about the choice of the particular U.S. venue (the § 1404(a) question) have long been decided separately from questions about the convenience of the American forum (the *forum non conveniens* question). *See Piper*, 454 U.S. at 240-41 (case transferred from California to Pennsylvania under § 1404(a) and then the international *forum non conveniens* issue was addressed). In fact, the Court said as much in *Piper*: "§ 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*." *Id.* at 253. *See also Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 n.4 (2d Cir. 2001) (*en banc*) ("Where good reasons support conducting the litigation in the United States, but another U.S. district is markedly more convenient than the plaintiff's chosen forum, it will often be preferable 'for the convenience of parties and witnesses, in the interest of justice,' to transfer venue under 28 U.S.C. § 1404(a), rather than dismissing the case for *forum non conveniens*."); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 n.5 (8th Cir. 1991) ("Of course, if the plaintiff selects a federal district that is itself truly inconvenient for the defendant, the defendant can request a transfer to another federal district under 28 U.S.C. § 1404.").

The Third Circuit missed this distinction. As noted, the Third Circuit suggested in a dictum that federal district court in Denver might be a proper place to bring the case, given that Colorado is "the

home forum of the corporate defendant [*i.e.*, Qwest]". App. 15a. It emphasized that New Jersey lacked an interest. *See* App. 20a ("there is little public interest in subjecting [New Jersey citizens] to the burdens of jury service"). The court went on:

> It would be problematic if granting a motion to dismiss for *forum non conveniens*, based on local considerations, precluded a plaintiff from filing the suit in another, convenient district. Thus, the conclusion we reach in this case does not necessarily mean that this action may not be maintainable in another federal district.

App. 16a.

The Third Circuit's caveat exposes a central weakness in its approach. It requires each district court to separately answer the *forum non conveniens* question from the perspective of the specific judicial district in which that court sits, rather than speak for the United States as a single nation. It thus confuses the *forum non conveniens* issue with the inquiry under 28 U.S.C. § 1404(a).

3. The Third Circuit's Approach Invites Inefficiency And Inconsistency.

If the Third Circuit's approach of weighing convenience from the perspective of the particular district in which the district court sits were followed it would lead to seriatim consideration separately by a series of district courts. Here, indeed, the Third Circuit implicitly invited the Trustees to re-file their

case in the District of Colorado. But that would leave the District of Colorado with having to conduct an entirely independent *forum non conveniens* analysis (most likely under a different (*i.e.*, "Tenth Circuit") formulation). The notion of multiple courts considering the issue invites inefficiency and inconsistency.

There should be only one federal *forum non conveniens* analysis performed, and it should speak to the convenience of the entire United States. A rule that a plaintiff dismissed in one federal district on grounds of *forum non conveniens* should pick up and try again in another district would invite waste of scarce judicial resources, undermine the notion of a single, unified judiciary, and undermine the very premise of the venue-transfer provision, 28 U.S.C. § 1404(a), which is to *transfer* cases where another venue is more convenient.

C. This Court Should Resolve The Conflict Among The Circuits On This Important Issue Of Foreign Access To The Courts, Typically Addressed As A Matter Of National Policy.

The Third Circuit's ruling is flatly inconsistent with the decisions of the First, Eighth, and Eleventh Circuits, each of which has held that the forum

comparison should be *exclusively* between the United States and the foreign country.[9]

Specifically, the Eleventh Circuit emphasized the difference between how the *forum non conveniens* doctrine is applied in the federal and state courts in *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002), and at the same time marked the distinction between the *forum non conveniens* doctrine and venue transfer under § 1404(a). The question presented was whether, in a diversity case, the *forum non conveniens* analysis should be addressed as a matter of state or federal common law. The distinction was important because of the different forum focus, and the court concluded that the "federal rule" applied:

> The analytical inconsistency can be demonstrated by focusing on the Florida *forum non conveniens* standard, which only considers the contacts that a lawsuit has with the State of Florida. The Florida standard, if

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[9] The issue is recurring. For example, the question was recently posed to the Ninth Circuit, too, but not definitively answered. *See Schijndel v. Boeing Co.*, No. 06-55930, 2008 WL 65090 (9th Cir. Jan. 7, 2008) (slip op.). Responding to appellants' argument that the district court improperly compared the interests of *California* instead of "the United States as a whole," the court pointed out that "the district court did consider the United States' interest in the lawsuit," including "a number of factors whose significance remains the same whether the comparison is to California or to the United States as a whole...." *Id.* at *1.

> applied in federal court, would require the district court to ignore the contacts the suit might have with other states in the determination of whether dismissal is appropriate. In contrast, a thorough analysis under § 1404(a) necessarily requires that the district court consider the contacts that a lawsuit has with any of the fifty states to determine if the case should be transferred there. In other words, *a seamless system of national venue rules requires federal courts to look to the connections a lawsuit has with the entire United States.* Application of a state standard like Florida's, therefore, would require an analysis by the district court that is incongruent with the analysis required under § 1404(a).

Id. at 1313 (emphasis added); *see also id.* at 1303 (observing that "federal courts, in the *forum non conveniens* context, do not focus on the connection between the case and a particular state, but rather on the connection of the case to the United States as a whole"); *see also La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983).

The First Circuit reached the same result in *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419 (1st Cir. 1991). In that case, the court of appeals faulted the district court's *forum non conveniens* analysis for focusing on plaintiff's contacts with the State of Massachusetts as compared to the United States. *Id.* at 429 (emphasis in original). Pointing out that "the choice facing the district court was between two

countries – the United States and Turkey," the First Circuit stated that at issue was "a controversy *local to the United States*, if not necessarily to Massachusetts") (first emphasis in original; second emphasis added).

And in *Hansen*, the Eighth Circuit observed the same rule: "the 'home forum' for the [U.S.] plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." 933 F.2d at 1394. *See also id.* n.5 (pointing out that as between courts within the United States, the remedy for selecting a more convenient venue is 28 U.S.C. § 1404). The Third Circuit's approach is flatly inconsistent with each of these decisions framing the analysis in terms of the United States as a whole.

The Third Circuit's analysis is also inconsistent with how this Court analyzed the forum comparison in *Piper*, and how the Ninth and D.C. Circuits have framed the forum comparison. *See Piper*, 454 U.S. at 260-61 (referring to "American" and "Scottish" interests); *Villar*, 782 F.2d at 1482-83 (referring to the "American forum"); *Friends for All Children*, 717 F.2d at 609 (citing lawsuit's "connection to the United States").

This Court should resolve this explicit conflict between the Third Circuit's decision and the decisions of the First, Eighth, and Eleventh Circuits (and, implicitly, the Ninth and D.C. Circuits).

Indeed, because the issue is one that affects the manner in which the United States presents itself to the world, it is the type of conflict among the circuits

that should be resolved expeditiously by this Court. Access to U.S. courts is a matter of national, not local, policy which ought not turn on considerations unique to any particular judicial district.

That the question of access to U.S. courts is a matter of national, not local, significance is demonstrated, for example, in Chapter 15 of the Bankruptcy Code, 11 U.S.C § 1501, *et seq*, which reflects a congressional policy of cooperation between "courts of the United States" and "the courts and other competent authorities of foreign countries involved in cross-border insolvency cases." 11 U.S.C. § 1501(a)(1). That chapter encourages foreign bankruptcy trustees to use U.S. courts in connection with the administration of international insolvencies by granting access to bankruptcy court for certain actions, *e.g.*, § *id.* § 1504, and expressly preserving any right a "foreign representative may have to sue in a court of the United States to collect or recover a claim which is the property of the debtor." *Id.* § 1509(f). That is precisely this case.

Equally important, access to U.S. courts is frequently the subject of treaties. In this case, for example, there is a treaty of friendship between the United States and the Netherlands that gives Dutch entities "national access" to the U.S. courts, on par with American citizens. It provides that:

> Nationals and companies of either Party [the United States and the Netherlands] shall be accorded national treatment with respect to access to the courts of justice . . . within the territories of the other Party, in all degrees of

> jurisdiction, both in pursuit and in defense of their rights.

See App. 106a. *See Sumitomoshoji America, Inc. v. Avagliano*, 457 U.S. 176, 188 & n.18 (1982) (treaty granting "national treatment" guarantees that the foreign entity can come into U.S. courts "without suffering discrimination as an alien entity"). In light of a treaty commitment to give Dutch nationals and companies "national treatment" in U.S. courts, it is difficult to find justification for a restriction on that access based on the limited interests of the citizens of a single judicial district.

The Third Circuit's decision essentially stacks the deck against foreign plaintiffs, including foreign plaintiffs suing in their official, appointed capacity, undermining the national policies supporting access to U.S. courts, especially in the increasingly internationalized world of litigation and bankruptcy.

This Court should resolve this important conflict.

II. THE COURT MAY WISH TO CONSIDER SUMMARY DISPOSITION.

The prior decisions of this Court and Congress's decision to address *forum non conveniens* concerns within the United States by transfer rather than dismissal – combined with both the desire to address access to federal U.S. courts at the national level and the conceptual weaknesses in the Third Circuit's decision to ask district courts to speak only for the district, not for the United States – make it clear that the Third Circuit has set forth the wrong rule.

In applying the doctrine of *forum non conveniens* in an international setting, the relevant *domestic* forum is the entire United States. This Court may, in the interest of efficiency and to correct a fundamental error, dispose of this petition summarily.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Clifton S. Elgarten
Counsel of Record
Richard McMillan, Jr.
Daniel W. Wolff
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2500

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Counsel for Petitioners